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NOTE AND COMMENT

WHEN THE DESCENDANTS OF A PREDECEASED LEGATEE WILL NOT TAKE UNDER A STATUTE OF SUBSTITUTION.—There are in most states statutes declaring that if a person named as legatee dies before the testator, his descendants shall take his share. *Downing* v. *Nicholson,* 115 Ia. 493; *Strong* v. *Smith,* 84 Mich. 567; 18 A. & E. ENCYC. OF LAW, 2d Ed. 755. A common type is such as is found in the Civil Code of California, sec. 1310, viz.: "When any estate is devised or bequeathed to any child or other relation of the testator and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator." Under this statute the Supreme Court of California has just held (two judges dissenting) that descendants of a legatee dying after the will was made, but before a codicil confirming it do not take because (1) the statute is one of distribution having reference only to conditions existing at the time of death of the maker of the will and not to the time of the decease of the original legatee, (2) because the republication subsequent to the death of the legatee made the lapsed legacy a void legacy, and (3) because the statute applied only to lapsed and not to void legacies. *In re Matthews' Estate,* (Calif. 1918), 169 Pac. 233.

We shall consider these points in their order. Notwithstanding the terms

of many of the statutes that gifts shall not lapse, it seems settled in most jurisdictions that they do, and that the legatee takes an independent gift by force of the statute. ROOD ON WILLS, sec. 675; *Fisher* v. *Hill,* 7 Mass. 86; *Mann* v. *Hyde,* 71 Mich. 278; *Thompson* v. *Myer,* 95 Ky. 597, and the subject of the bequest forms no part of the primary legatee's estate; *Cook* v. *Munn,* 12 Abb. N. C. 344; *Jones* v. *Jones,* 37 Ala. 646; *Re Hafner,* 45 App. Div 549; *Smith* v. *Smith,* 5 Jones Eq. (N. C.) 305; *Glenn* v. *Belt* 7 G. & J. (Md.) 362; nor is the gift subject to the debt of the primary legatee or devisee to the testator; *Hemsley* v. *Hollingsworth,* 119 Md. 431; *Wattenbarger* v. *Payne,* 162 Mo. App. 434; *Carson* v. *Carson,* 1 Metc. (Ky.), 300. But see *Baker* v. *Carpenter,* 69 Ohio St. 15, *Denise* v. *Denise,* 37 N. J. Eq. 163; *Tilton et al.* v. *Tilton* (Mass. 1907), 82 N. E. 704; *Smith* v. *Williams,* 89 Ga. 9, 32 Am. St. Rep. 67; *Cook* v. *Munn* (*supra*); *Harris* v. *Harris,* 12 Gill and J. (Md.) 474; *Vogel* v. *Turnt,* 110 Md. 192. This is not true of the English statute. The English courts have interpreted their statute literally to the effect that the deceased legatee is deemed alive until after the death of the testator. The descendants then take as heirs of the legatee subject to all the incidents of the original gift. *Johnson* v. *Johnson,* 3 Hare, 156; *Eager* v. *Furivall,* 17 Ch. D. 115, and the same is true in Canada. *Re. Carter,* 20 O. L. R. 127. The effect given these statutes by the American authorities shows that they are by no means placed on the same footing by the courts as substitution by words of the testator in the will by which the substituted legatee takes subject to all the incidents of the original gift. ROOD ON WILLS, secs. 699-702.

While it is often said in the American cases that these statutes enter into and become a part of the testator's will, the courts were not attempting to determine whether the beneficiary took by virtue of the will or by virtue of the statute alone, or when and in what way the statute took effect. Yet the cases are so numerous in which these statements are made and the language is so explicit that they are entitled to some weight. For instance, in *Carson* v. *Carson* (*supra*), the Court said: "The surviving issue take the estate devised not as heirs at law or distributees of the deceased devisee but as legatees directly and immediately under and by virtue of the will." In *Wattenbarger* v. *Payne* (*supra*) it was said "The legislature enacted a law that, in the contingency of the father's death, made his child an *original legatee* of the grandfather. It is everywhere agreed that an applicable statute enters into and becomes a part of the testator's will. Therefore, should it not be said that the grandfather willed the legacy to his son, if he be alive at the grandfather's decease, but if he be dead then to the children of the son?" Many similar statements are to be found in the cases. The doctrine of the principal case is inconsistent with all this. It has been held that the statute applies to a will made before its passage where the legatee died subsequent to its passage. *Bishop* v. *Bishop,* 4 Hill (N. Y.) 138; *Dozey* v. *Killam,* 1 Duv. (Ky.) 403, but that if the legatee died before the statute was passed, his descendant would not take under the statute, but that the legacy would lapse. *Murphy* v. *McKeon,* 53 N. J. Eq. 406; *Harrison's Estate,* 10 Pa. Dist. 45.

A more serious question arises in the second conclusion reached by the court. That republication makes a lapsed legacy a void legacy seems never

to have been the subject of an actual decision before, though there are *dicta* stating as much in some English cases. See *Winter* v. *Winter,* 5 Hare 306; *In re Fraser* (1904), 1 Ch. 726. The former case was identical in facts with the present in so far as they are pertinent to our question. The court cited no authorities and held that legacies to persons dead when the will was made were within the purview of the English statute. This effect of republication seems hardly tenable under the English statute where, by its very terms, the legatee is deemed to be alive until after the death of the testator. See *Johnson* v. *Johnson* (*supra*); *Eager* v. *Furnivall* (*supra*). The statute does not seem to be involved in the latter case and in all the authorities cited by the court the will was given an operative effect. In most of the cases in which the courts have mentioned republication it has been to give the will an operative effect that it would not have had without republication,—to make it valid if the prior execution was defective or revoked, to pass after acquired property, etc. *Rood on Wills,* Sec. 396-7, and rarely if every as in *In re Matthew's Estate* (*supra*) to prevent a will operating which would have had an operative effect without republication. See *Mann* v. *Hyde* (*supra*) and *Harrison's Estate* (*supra*). The very same court that decided the principal case held a gift to charity which the statute declared void if made within thirty days of the testator's death was not invalidated by republication within that period. *McCauley's Estate,* 138 Calif. 432, 546.

Admitting that the republication deprived the will of all benefit from prior publication only, does it follow that the descendants of a legatee dead when the will was made cannot take? Several courts have held the descendants of legatees dead when the will was made take by force of the statute. *Lewis* v. *Corbin,* 195 Mass. 520; *Nutter* v. *Vickery,* 64 Me. 490, 498; *Wildberger* v. *Cheek,* 94 Va. 517; *Mower* v. *Orr,* 7 Hare 472; *Minter's Appeal,* 40 Pa. St. III. Other courts have held they do not take. *Pegues* v. *Pegues,* 70 S. C. 544; *Lindsay* v. *Pleasants,* 39 N. C. 320; *Scales* v. *Scales,* 6 Jones Eq. (N. C.) 163; *Moss* v. *Heisley,* 60 Tex. 426; *Billingsly* 1. *Tongue,* 9 Md. 575; *Almy* v. *Jones,* 17 R. I. 265, 270. The phrasing of the statutes may reconcile some of the apparent conflict. In *Lindsay* v. *Pleasants, Scales* v. *Scales, Moss* v. *Helsley,* the statutes referred specifically to lapsed legacies. In *Billingsly* v. *Tongue,* the statute read "no devise shall lapse or fail of taking effect by reason of the death of the devisee in the lifetime of the testator." In *Almy* v. *Jones* the statute applied only when a person "having a devise or bequest shall die before the testator." This language was held inapplicable to one who was dead before the devise or bequest was made. It is to be noted that the language of the Civil Code of California, sec. 1310 (*supra*) is broad enough to include both cases before and after the making of the will. Statutes of this latter type have been held to include both. See cases cited *supra.* Statutes of more restricted wording have been held to extend to legatees dead when the will was made. See *Mower* v. *Orr* (*supra*), *Minter's Appeal* (*supra*). *Pegues* v. *Pegues* (*supra*), however, is in accord with the principal case. The cases of *Doe on the Demise of Hearn* v. *Roe,* 4 Houst. (Del.) 20, and *Stennett* v. *Hall,* 74 Ia. 279, cited by the court, do not involve the statutes. R. A. F.